RAJASEGARAN VN RAJAH & ORS

v.

ALL MALAYAN ESTATES STAFF UNION (AMESU)

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-01-99-04]
1 JUNE 2005

LABOUR LAW: *Industrial Court - Chairman - Appointment of - Whether appellant qualified for appointment as a Chairman of Industrial Court - Whether appellant had requisite minimum legal experience as envisaged under s. 23A(1) Industrial Relations Act 1967 - Industrial Relations Act 1967, s. 23A(1) - Legal Profession Act 1976, s. 3*

STATUTORY INTERPRETATION: *Construction of statutes - Purposive approach - Interpretation of s. 23A(1) Industrial Relations Act 1967 - Whether judicial commissioner failed to give effect to plain meaning of words used in s. 23A(1) - Whether judicial commissioner erred by adopting purposive approach wrongly - Industrial Relations Act 1967, s. 23A(1) - Legal Profession Act 1976, s. 3*

WORDS & PHRASES: *"advocate and solicitor" - Industrial Relations Act 1967, s. 23A(1) - Meaning of*

This appeal by the appellants concerned the interpretation of s. 23A(1) Industrial Relations Act 1967 ('IRA') and whether the first appellant was a person qualified to be a Chairman of the Industrial Court within the context of the aforesaid section. The first appellant, prior to his appointment as a Chairman of the Industrial Court on 15 January 2004, had been on the roll of advocates and solicitors for more than eight years after having been admitted as an advocate and solicitor of the High Court on 15 December 1995, although he was in actual practice for only four years, nine months and 22 days. The learned judicial commissioner ('JC') ruled that the first appellant was not qualified for appointment as a Chairman because he lacked the minimum legal experience as envisaged under s. 23A(1) IRA. Adopting the purposive approach, she interpreted the term "advocate and solicitor" in the section to mean an advocate and solicitor who had been issued with a practising certificate for at least seven years. The appellants contended that the learned JC, in reaching her conclusion, had failed to take into consideration the statutory definition of "advocate and solicitor" within the meaning of the Legal Profession

Act 1976 ('LPA') as expressly provided in s. 23A(1) IRA. They also averred that the learned JC had erred by adopting the purposive approach wrongly in interpreting the provisions of s. 23A(1) IRA.

Held (allowing the appeal and setting aside the orders of the High Court)

Per Nik Hashim JCA delivering the judgment of the court:

[1] The qualification for the appointment as a Chairman of the Industrial Court is clearly stated in s. 23A(1) IRA. There is nothing in either the provisions of s. 23A(1) IRA specifically or in the LPA generally, which explicitly stipulates that the candidate had to have been in "active practice" before he could be appointed as a Chairman. The statutory definition of "advocate and solicitor" as required by s. 23A(1) IRA is contained in s. 3 LPA which defines the phrase to mean an advocate and solicitor of the High Court admitted and enrolled under the LPA or under any written law prior to the LP coming into operation. These two provisions have to be read in tandem, for the reference in s. 23A(1) IRA to "an advocate and solicitor within the meaning of the LPA" clearly refers to the statutory definition contained in s. 3 LPA. Thus, the learned JC had erred in opting to give a wider interpretation to s. 23A(1) IRA by requiring an advocate and solicitor to maintain a practising certificate for seven years to qualify for appointment as a Chairman. Such an interpretation of s. 23A(1) IRA clearly exceeded the definition intended by Parliament to the phrase "advocate and solicitor" in s. 3 LPA. (p 865 d-g)

[2] Section 23A(1) IRA was enacted especially for a specific purpose, that is to provide for the qualification of the President and the Chairmen of the Industrial Court. As such, the learned JC had no choice but to give effect to the plain meaning of the words used in the provisions rather than inventing ambiguities in them. However, in reaching her decision, the learned JC failed to take into consideration the clear words employed by the draftsman in s. 23A(1) IRA. If indeed it was Parliament's intention for only legally qualified appointees who have a practising certificate for at least seven years to qualify for appointment as a Chairman, as understood by the learned JC, the draftsman would surely have employed different words in crafting the section. That being the case, the first appellant was a qualified person to be appointed as a Chairman of the Industrial Court as he had been an advocate and solicitor for seven years before the appointment. Furthermore, the first appellant also had wide experience in matters relating to industrial relations. (pp 867 h, 868 d & 869 c-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Rayuan oleh perayu-perayu di sini menyentuhi pentafsiran s. 23A(1) Akta Perhubungan Perusahaan 1967 ('APP') dan sama ada perayu pertama adalah seorang yang layak untuk menjadi Pengerusi Mahkamah Perusahaan dalam konteks seksyen tersebut. Perayu pertama, sebelum dilantik sebagai Pengerusi Mahkamah Perusahaan pada 15 Januari 2004, berada dalam daftar peguambela dan peguamcara selama lebih lapan tahun setelah diterima masuk sebagai seorang peguambela dan peguamcara Mahkamah Tinggi pada 15 Disember 1995, walaupun tempoh beliau beramal hanyalah empat tahun, sembilan bulan dan 22 hari. Yang arif Pesuruhjaya Kehakiman ('PK') mendapati bahawa perayu pertama tidak layak dilantik sebagai Pengerusi kerana beliau tidak mempunyai pengalaman beramal minima seperti yang ditetapkan oleh s. 23A(1) APP. Dengan mengambil pendekatan tujuan (purposive approach), PK mentafsirkan perkataan "peguambela dan peguamcara" di dalam seksyen sebagai bermaksud seorang peguambela dan peguamcara yang telah diberikan sijil amalan untuk tempoh sekurang-kurangnya tujuh tahun. Perayu-perayu mengatakan bahawa yang arif PK, dalam mencapai keputusannya, telah gagal mengambilkira definasi undang-undang "peguambela dan peguamcara" menurut maksud Akta Profesion Undang-Undang 1976 ('APU') sepertimana yang diperuntukkan dengan jelasnya oleh s. 23A(1) APP. Mereka juga berhujah bahawa yang arif PK khilaf apabila mengambil pendekatan tujuan sewaktu mentafsir peruntukan s. 23A(1) APP.

Diputuskan (membenarkan rayuan dan mengenepikan perintah-perintah Mahkamah Tinggi)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Kelayakan untuk perlantikan Pengerusi Mahkamah Perusahaan telah digaris dengan jelas oleh s. 23A(1) APP. Tiada suatu apapun, sama ada di dalam s. 23A(1) khususnya atau di dalam APU amnya, yang menyatakan bahawa seseorang calon harus terlebih dahulu "beramal secara aktif" sebelum ianya layak dilantik sebagai seorang Pengerusi. Definasi undang-undang "peguambela dan peguamcara" seperti yang dikehendaki s. 23A(1) APP adalah terkandung dalam s. 3 APU yang mentafsirkan ungkapan tersebut sebagai bermaksud seorang peguambela dan peguamcara Mahkamah Tinggi yang diterima masuk dan didaftar di bawah APU atau di bawah mana-mana undang-undang bertulis sebelum APU mula berkuatkuasa. Kedua-dua peruntukan ini hendaklah dibaca dengan selari, oleh kerana rujukan di dalam s. 23A(1) APP kepada "peguambela dan peguamcara menurut maksud APU" jelas merujuk kepada definasi statutori di dalam s. 3 APU. Oleh itu, yang arif PK silap dalam bertindak memberikan pentafsiran yang lebih luas kepada s. 23A(1) APP dengan mengkehendaki seseorang

peguamcara dan peguambela mengekalkan sijil amalan selama tujuh tahun bagi melayakkannya untuk dilantik sebagai seorang Pengerusi. Pentafsiran s. 23A(1) yang sedemikian jelas melangkaui definasi yang diinginkan oleh Parlimen terhadap ungkapan "peguambela dan peguamcara" di dalam s. 3 APU.

[2] Seksyen 23A(1) APP digubal khusus untuk tujuan yang khas, iaitu untuk memperuntukkan syarat-syarat hilang kelayakan bagi Presiden dan Pengerusi-Pengerusi Mahkamah Perusahaan. Oleh yang demikian, yang arif PK tidak ada pilihan melainkan memberi kesan kepada maksud jelas perkataan-perkataan yang digunakan di dalam peruntukan dan tidak mencipta kekaburan di situ. Bagaimanapun, dalam mencapai keputusannya, yang arif PK gagal mengambilkira perkataan-perkataan jelas yang digunakan oleh penggubal di dalam s. 23A(1) APP. Jikalah Parlimen memang berniat untuk menjadikan orang-orang yang layak dilantik sebagai Pengerusi adalah orang-orang yang mempunyai pengalaman beramal selama tujuh tahun sekurang-kurangnya, sepertimana yang difahamkan oleh yang arif PK, penggubal tentulah akan menggunakan perkataan-perkataan lain apabila menggubal seksyen ini. Oleh hal yang demikian, perayu pertama adalah orang yang layak untuk dilantik sebagai Pengerusi Mahkamah Perusahaan kerana beliau adalah seorang peguambela dan peguamcara selama tujuh tahun sebelum perlantikannya. Lagipun, perayu pertama mempunyai pengalaman yang luas dalam hal-hal berkaitan perhubungan perusahaan.

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran VN Rajah & Ors [2005] 2 CLJ 186 HC ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Dupont Steels Ltd & Ors v. Sirs & Ors [1980] 1 WLR 142 ***(foll)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Malaysian Bar v. Dato' Kanagalingam Velupillai [2004] 4 CLJ 194 FC ***(foll)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Anor Appeal [2004] 2 CLJ 265 FC ***(refd)***

Samantha Murthi v. Attorney-General Malaysia & Ors [1982] CLJ 241; [1982] CLJ (Rep) 213 FC ***(refd)***

Legislation referred to:

Housing Developers (Control and Licensing) Act 1966, s. 16C(1)
Industrial Relations Act 1967, s. 23A(1)
Interpretation Acts 1948 and 1967, s. 17A
Legal Profession Act 1976, ss. 3, 13(1), 21(1)

For the appellants - Abdul Rahim Uda SFC (Narkunavathy Sundareson SFC with him); AG's Chambers
For the respondent - VK Raj; M/s Kuppusamy & Co
Anand Ponnudurai watching brief for Malaysian Bar

[Appeal from High Court, Kuala Lumpur; Application For Judicial Review No: R2-25-05-04]

Reported by Suresh Nathan

JUDGMENT

Nik Hashim JCA:

This appeal concerned the interpretation of s. 23A(1) of the Industrial Relations Act 1967 (the Act) and whether the first appellant was a person qualified to be Chairman of the Industrial Court within the context of the section which reads:

> A person is qualified for appointment as President under section 21(1)(a) and as Chairman under section 23(2) if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of the Legal Profession Act 1976 (Act 166) or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.

The term 'advocate and solicitor' referred to in s. 23A(1) of the Act is defined under s. 3 of the Legal Profession Act 1976 (Act 166) as follows:

> In this Act unless the context otherwise requires:
>
> 'advocate and solicitor', and 'solicitor' where the context requires means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.

It was not in dispute that the first appellant prior to his appointment as Chairman of the Industrial Court on 15 January 2004, had been on the roll of advocates and solicitors for more than eight years after having been admitted as an advocate and solicitor of the High Court on 15 December 1995, although he was in actual practice for only four years nine months and 22 days.

The learned judicial commissioner (JC) in her judgment reported at [2005] 2 CLJ 186 ruled that the first appellant was not qualified for appointment as Chairman because he lacked the minimum legal experience as envisaged under s. 23A(1) of the Act. Adopting the purposive approach, she interpreted the term 'advocate and solicitor' in the section to mean an advocate and solicitor who has been issued with a practising certificate for at least seven years. According to her, being admitted as well as maintaining a practising certificate for at least seven years would raise the presumption that one had legal experience.

In support of the learned JC's decision, learned counsel for the respondent submitted that the relevant part of s. 23A(1) of the Act clearly states "… if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of Act 166 …". It does not say that a candidate has to be an advocate and solicitor "as defined" in s. 3 of Act 166. The relevant words in s. 23A are … "within the meaning" of Act 166 which clearly refer to the broad usage of the term 'advocate and solicitor' in various other parts of Act 166, which in turn will imply that a candidate for the post of Chairman of the Industrial Court must necessarily have been in active practice as an advocate and solicitor.

Learned Senior Federal Counsel for the appellants, on the other hand, contended that the learned JC in reaching her conclusion, had failed to take into consideration the statutory definition of 'advocate and solicitor' within the meaning of Act 166 as expressly provided in s. 23A(1) of the Act. He also complained that the learned JC had erred by adopting the purposive approach wrongly in interpreting the provisions of s. 23A(1) of the Act.

In our judgment the qualification for the appointment as Chairman of the Industrial Court is clearly stated in s. 23A(1) of the Act. There is nothing in either the provisions of s. 23A(1) specifically or in Act 166 generally, which explicitly stipulate that the candidate had to have been in 'active practice' before he could be appointed as Chairman. The statutory definition of 'advocate and solicitor' as required by s. 23A(1) is contained in s. 3 of Act 166 which defines the phrase to mean an advocate and solicitor of the High Court admitted and enrolled under Act 166 or under any written law prior to the coming into operation of Act 166. These two provisions have to be read in tandem, for the reference in s. 23A(1) to "an advocate and solicitor within the meaning of the Legal Profession Act 1976 (Act 166)" clearly refers to the statutory definition contained in s. 3 of Act 166.

Thus, we agree with the learned Senior Federal Counsel that the learned JC erred in opting to give a wider interpretation to s. 23A(1) by requiring an advocate and solicitor to maintain a practising certificate for seven years to qualify for appointment as Chairman. This interpretation of s. 23A(1) clearly exceeds the definition intended by Parliament to the phrase 'advocate and solicitor' in s. 3 of Act 166.

The learned JC had taken pains to drive home that the court was not interested in either the quality of the practice or the experience of the candidate as these were matters to be decided upon by the second appellant, and yet she proceeded to hold the requirement of legal experience as a prerequisite to qualifying for appointment as Chairman under s. 23A(1). And she further held that the maintenance of a practising certificate for at least seven years would

give rise to the presumption that a candidate has legal experience. In our view, she was erroneous. Such an interpretation as requiring only an advocate and solicitor who has maintained a practising certificate for at least seven years has the legal experience to be qualified for appointment as Chairman is in direct conflict with the clear and plain provisions of s. 23A(1) of the Act read together with s. 3 of Act 166. The court must not add words into legislation which were not intended. In *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333, Jemuri Serjan CJ (Borneo) reminded:

> In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and **we must guard ourselves against adding words into them which were never intended.** (emphasis added)

In *Samantha Murthi v. Attorney-General Malaysia & Ors* [1982] CLJ 241; [1982] CLJ (Rep) 213 wherein the Federal Court had occasion to interpret s. 13(1) of Act 166, Suffian LP in delivering the judgment of the court held:

> What is in dispute in this case is the meaning which we should give to the phrase "active practice in Malaysia" in section 13(1). As earlier stated, that section provides that "a pupil shall serve his period of pupillage with an advocate and solicitor who is or has been in active practice in Malaysia etc." Thus there are two requirements: First, the master must be
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> (1) "an advocate and solicitor" within the meaning of section 3 of the Act; and
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> (2) he "is or has been in active practice in Malaysia"
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> The learned Judges in the High Court ruled that Mr. Reddy is not an advocate and solicitor under section 3 because he does not hold a practising certificate issued under section 29 of the Act authorizing him to practise at the Malayan Bar.
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> With respect we do not agree with this ruling, because there is nothing in section 3 to say that he must be in possession of such a certificate. In fact Mr Param Cumaraswamy conceded that Mr. Reddy is an advocate and solicitor under section 3. Under this section an advocate and solicitor is defined as:
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> > an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.
>
> **This section does not say that to be an advocate and solicitor one must have a practising certificate.** In our judgment Mr. Reddy is an advocate and solicitor within the Act although he has no practising certificate under the Act. **As long as he has been "admitted and enrolled" under the Act or any previous written law, he is an advocate and solicitor within the meaning of the Act. A practising**

certificate is not a requirement of section 3, but of section 29, which has nothing to do with the definition. The learned Judges were therefore in error when they said:

> He [Mr. Reddy] can only be a section 3 advocate and solicitor who is in practice if he holds a practising certificate issued under section 29 of the Legal Profession Act.

> As regards the second requirement under section 13(1), i.e. that Mr. Reddy must be a person who "is or has been in active practice in Malaysia", there is no doubt that he is and has been in active practice in Sarawak which is part of Malaysia. (emphasis added)

Therefore, it must necessarily follow that if a practising certificate is not a requirement of s. 3 of Act 166, likewise, it cannot possibly be made a requirement of s. 23A(1) of the Act.

It is true that in the interpretation of a provision of an Act, one must have regard to the purpose of the Act. (see *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Anor Appeal* [2004] 2 CLJ 265). Section 17A of the Interpretation Acts 1948 and 1967 (Act 388) states:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

In the present case, s. 23A(1) of the Act read together with s. 3 of Act 166 are clear and unambiguous in their terms. Thus, when she adopted the purposive approach in interpretating the provisions by adding words which were not intended, the learned JC was employing a construction that produces an unjust result and therefore such an approach does not promote the purpose or object underlying the Act. A purposive approach in the interpretation of a statute as required under s. 17A of Act 388 does not mean that a literal approach in the interpretation should be disregarded. A construction, be it purposive or literal, that would promote the purpose or object underlying a statute that matters to the court in the interpretation of a statue.

It must be noted that s. 23A(1) of the Act was enacted especially for a specific purpose that is to provide for the qualification of President and Chairman of Industrial Court. Such being the case, the learned JC had no choice but to give effect to the plain meaning of the words used in the provisions rather than inventing ambiguities in them. The Federal Court in *Malaysian Bar v. Dato' Kanagalingam Velupillai* [2004] 4 CLJ 194 at p. 200 agreed with the observation made by Lord Diplock in *Dupont Steels Ltd & Ors v. Sirs and Ors* [1980] 1 WLR 142 at p 157:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning …

Since the provisions of s. 23A(1) of the Act are precise and unambiguous, it is therefore superfluous for the learned JC to resort to the introduction speech of the Deputy Minister of Human Resources in moving the Bill of Act 166 as the words of the Deputy Minister cannot be determinative of the provisions in the section since the speech is only available as an aid to interpretation. Edgar Joseph Jr FCJ in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 at p. 299 cautioned:

> We hasten to add, however, that when resort to *Hansard* is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it *is only available as an aid to interpretation. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.* (emphasis added)

Obviously, in reaching her decision, the learned JC failed to take into consideration the clear words employed by the draftsman in s. 23A(1) of the Act. If indeed it was Parliament's intention for only legally qualified appointees who have maintained a practising certificate for at least seven years to qualify for appointment as Chairman, as understood by the learned JC, the draftsman would have surely employed different words in crafting the section.

Clear examples of choice of words used are found in ss. 13(1) and 21(1) of Act 166 – "an advocate and solicitor who is and has been in active practice" and "he has been in active practice as an advocate and solicitor" respectively show Parliament's intention to impose a higher requirement on advocates and solicitors who take on pupils or article clerks.

A similar usage of words in drafting s. 16C(1) of the Housing Developers (Control and Licensing) Act 1966 (Act 118) was employed to impose a higher qualification for appointment as Chairman of the Housing Tribunal. That section reads:

> The Tribunal shall consist of the following members:
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> (a) …
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> (b) not less than five members to be appointed by the Minister from amongst persons who are members of the Judicial and Legal Service or **advocates and solicitors** of the High Court in Malaya **and have practised for not less than seven years.** (emphasis added)

Clearly, therefore, the draftsman's choice of words is indicative that Parliament when drafting s. 23A(1) of the Act purposely did not intend to impose the qualifications required of a Chairman of the Housing Tribunal on the Chairman appointed under s. 23A(1) of the Act. The usage of different words in these legislations point to different meanings being attributed to them. Thomson CJ in *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1 at p. 3 said:

> It is axiomatic that when different words are used in a statute they refer to different things … .

That being the case, we declared that the first appellant was qualified to be appointed as Chairman of the Industrial Court as he had been an advocate and solicitor for seven years before the appointment. Furthermore, the Public Services Commission of Malaysia, the second appellant, was satisfied that the first appellant was a qualified person to be Chairman of the Industrial Court as the latter, besides being an advocate and solicitor for seven years preceding his appointment, had wide experience in matters relating to industrial relations. Indeed this is what the Secretary of the Commission said of the first appellant in his affidavit at p. 111 para 6 of the record of appeal:

> 6. Saya juga menjelaskan bahawa Responden Pertama adalah seorang yang layak untuk menjadi Pengerusi Mahkamah Perusahaan setelah mengambil kira pengalaman luas Responden Pertama yang kebanyakannya melibatkan bidang Perhubungan Perusahaan sebagaimana yang berikut:
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> 6.1. Responden Pertama mempunyai pengalaman di dalam bidang Perhubungan Perusahaan di Sektor Korporat selama 28 tahun.
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> 6.2. Responden Pertama telah mengendalikan kes-kes di hadapan Mahkamah Industri sejak tahun 1977.
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> 6.3. Sejak 1981, Responden Pertama telah dilantik sebagai ahli panel Mahkamah Perusahaan di bawah s. 21(1)(b) Akta Perhubungan Perusahaan 1967 secara berterusan sehinggalah Responden Pertama dilantik sebagai Pengerusi pada 15.1.2004. Responden Pertama juga telah banyak berkhidmat sebagai ahli panel Mahkamah tersebut.

With the kind of experience that he had, the first appellant is undoubtedly more than qualified to be Chairman of the Industrial Court.

In the result, we unanimously allowed the appeal with costs here and below, set aside the orders of the High Court, and ordered that the respondent's application No. R2-25-05-2004 to be dismissed.